Squaring the circle: Level playing field provisions and the negotiation of a UK-EU free trade agreement

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Whilst the EU-UK trade negotiations have barely commenced, one thing is already quite clear: the two sides are poles apart on the key issue of level playing field (LPF) provisions and the extent to which these should feature in a future EU-UK free trade agreement. The aim of these provisions, as originally set out in the Political Declaration which the two sides agreed in October 2019,[1] would be to ensure open and fair competition between the UK and the EU essentially by providing for the maintenance of regulatory convergence in areas such as State aid, competition, social and environmental standards.

The UK Government has since made it clear that it does not consider such obligations as either necessary or reasonable given that it is seeking a trade deal which is no more ambitious than that which Canada has agreed with the EU. Equally, it opposes such commitments on the basis that any trade agreement with the EU should respect the UK's regulatory autonomy. For its part, the EU considers that robust LPF provisions would be necessary in relation to *any* trade deal with the UK, given the latter's geographic proximity and the interconnectedness of the UK and EU economies.

Unfortunately, this issue risks becoming a deal breaker and finding a compromise would be challenging given how entrenched the two sides seem to be in their respective positions. However, difficult as this might be, it should not be impossible to come to an arrangement which recognises each side's regulatory autonomy but also facilitates regulatory alignment.

A possible way of doing this is considered below. However, first, it is important to consider the context and understand each side's position and room for manoeuvre on this issue.

Context matters

According to the Political Declaration, a future EU-UK trade relationship should be underpinned by robust LPF commitments in the form of "common high standards applicable in the [EU and the UK] at the end of the transition period."[2] No doubt, one side would be keen to stress that this document is not legally binding, and in any event provides for the precise nature of these commitments to be "commensurate with the scope and depth of a future relationship". Equally, the other, would be quick

to point out that the Political Declaration was agreed in good faith and recognises the need for "robust" LPF commitments so as to "prevent distortions of trade and unfair competitive advantages".[3]

Ultimately, arguments of this kind will not prove particularly helpful in advancing negotiations on this issue. Instead, it is important for each side to recognise that the other side's position is legitimate. It is legitimate for the UK to choose regulatory autonomy over a deeper trade relationship with the EU as it is legitimate for the EU to insist that *any* privileged access[4] to its market should be conditional on robust LPF commitments.

At the same time, it is important that both sides recognise that there is room for them to move away from their respective positions on this issue without compromising their respective interests. For example, while the EU might be rightfully concerned that, absent appropriate LPF commitments, granting *any* privileged market access to a major and geographically proximate trade partner, would lead to unfair competition, it should be possible to address these concerns without the UK having to adopt EU rules and regulations in its domestic legal order. In fact, the EU has already modified somewhat its initial position on this issue. However, as explained below, further steps in that direction should be possible and appropriate.

As to the substance of the UK's concerns in this context, there are arguably two subtly distinct issues here. First, as a matter of principle, a future free trade agreement with the EU should not constrain the UK's right as a sovereign state to regulate domestically as it sees fit. Second, the UK does not accept that LPF commitments should, in any event, involve the UK having to adopt the rules and standards of the EU – a separate sovereign entity.

In line with comments above, the UK's stance would seem stronger on the second issue. At the same time, the UK's position on the principle of regulatory autonomy merits review and reassessment within a wider context. This is considered below.

A matter of principle, a matter of interest

First, it is important to acknowledge that international treaties, freely entered by sovereign States, involve the creation of both rights and obligations and that compliance with those obligations constrain the ability of otherwise sovereign parties to act domestically in a manner which is inconsistent with those commitments.

For example, the ability of the UK parliament to legislate so as to limit the award of public contracts to UK suppliers only, is limited substantially by the UK's obligation under the plurilateral Agreement on Government Procurement (GPA)[5] to allow suppliers from 47 other countries, including all EU Member States, to compete for important UK public contracts above certain value. Similarly, the UK parliament cannot legislate so as to raise unilaterally the contract values which trigger this obligation as these are set at a GPA level. However, by accepting these obligations (and by implication constraining its ability to legislate in a manner which is inconsistent with them), the UK has secured the important benefit of access to the public procurement markets of 47 other countries for its own domestic suppliers.

If the principle of rights in exchange for commitments is valid and relevant, then the focus moves to the question of whether the type of commitments which the other side is seeking – in this case, the EU – are fair and proportionate. However, in the context of negotiations between two sovereign parties this issue is ultimately irrelevant. Each party is negotiating with a view to advancing its own

interests to the best of its abilities. To the extent that a party considers that the balance between rights and obligations on offer is unacceptable it has the option of walking away from the negotiations. Ultimately, the distinction between commitments which are acceptable and those which are not, would normally depend on what is at stake and, more specifically, the relative importance of what a party stands to lose by choosing to abandon the negotiating table rather than accept the commitments that the other side is seeking (i.e. in negotiation parlance, their respective "best alternative to a negotiated agreement").

In this regard, the principle that both the UK and the EU should commit to a set of "common high standards" aimed at ensuring open and fair competition between them should not be as controversial as it might first appear, not least in view of the UK's role in shaping many of these standards over the years and the country's excellent record in terms of compliance. Indeed, in recent pronouncements, the UK Government has tried to dispel concerns that in seeking to retain regulatory autonomy it intends to relinquish high standards in areas such as State aid, labour and environmental laws.[6]

The issue of subsidies is, in fact, instructive. There is no obvious interest for the UK Government to abandon its traditionally strict subsidies discipline. Indeed, compliance with strict limits on the State's ability to distort competition through State aid interventions constitutes an indispensable part of the UK's world-class competition regulatory regime, which has deservedly led to the UK's reputation as a place which is "open for business" and where enterprises can compete on the basis of a level-playing field. A more permissive subsidies regime would ultimately damage the competitiveness of the UK economy by discouraging enterprises more efficient and innovative. It could also lead to a domestic subsidies race to the bottom with devolved administrations competing with each other to attract investment or support local industries.

These issues would not have escaped the UK Government. At the same time, there are a number of advantages in enshrining strict anti-subsidy obligations in an international treaty. For example, this would make it more difficult for future Governments, which might perhaps be inclined to adopt a more dirigiste approach to the management of the economy, to change domestic laws so as to make it easier to grant subsidies. Equally, enshrining these obligations in an international treaty would enable the Government to diffuse pressure from specific industry groups or other lobbies for the State to intervene, using taxpayers' money, so as to support uncompetitive businesses or failing industries.

At the same time, given the UK Government's position that a trade deal with the EU should not impinge on the UK's regulatory autonomy, it would seem very unlikely that the UK would agree to LPF provisions which *require* it to apply domestically EU rules and regulations. As noted earlier, the EU has already softened its stance on this issue in certain respects. More specifically, whilst the EU is asking that the UK should apply EU State aid rules domestically, in relation to other areas, it is proposing that in upholding "common" high standards and "corresponding" high standards "over time", EU standards should constitute "a" reference point.[7] Although not entirely unambiguous,[8] this position is less maximalist than it could have been[9] and it is helpful as a starting point from which to try and reach a compromise.

A possible way forward

Given this context, a possible way forward might lie in the two sides agreeing to maintain common (or corresponding) high standards in certain regulatory areas but without this involving an obligation to maintain the same legislation. The principle underlying this commitment would be that the *effect* of their respective policies should be equivalent, with a view to ensuring that trade between the parties is carried out under conditions of open and fair competition.

In this regard, the two sides could also agree that, for a policy not to be deemed equivalent and consistent with the commitment to maintain common high standards, evidence should be required to demonstrate that its effects are harmful to open and fair competition between them. This is distinct from an approach where harmful effects, and therefore breach of the LPF commitments, could be assumed purely on the basis that non-equivalence in the scope or substance of the respective laws of the two sides, has been identified.

As a counterweight to this less stringent approach, the parties could agree to more effective trade defence provisions, including the ability to take unilateral interim measures, as part of wider dispute resolution arrangements to deal with LPF commitment disputes. It is true that this approach would go beyond the UK's position that any commitments on subsidies, labour and the environment, for example, should be outside a trade agreement's dispute resolution mechanism.[10] However, this would seem a reasonable compromise to make in the interest of reaching an overall agreement, given that, as explained below, the mechanism may be designed in a way which does not impinge on regulatory autonomy.

In this regard, an effective dispute resolution mechanism could be modelled partly on the provisions of Articles 13 and 14 of Annex 4 to the Ireland/Northern Ireland Protocol in the non-ratified Withdrawal Act of November 2018, but with such mechanism being actionable by either side.[11] On that basis, if either party considers that the other has relaxed relevant domestic rules and regulations in a way which breaches the obligation to maintain common high standards in agreed policy areas, that party may request a consultation within a Joint Committee[12] with a view to discussing the other side's concerns and finding a commonly acceptable solution.

If the Joint Committee fails to resolve the dispute, the party asserting a breach of the commitment to maintain common high standards (the "LPF commitments"), could then adopt unilaterally "appropriate remedial measures" pending resolution of the dispute via arbitration.

Specific rules would have to be agreed as regards the establishment, composition and powers of an arbitration panel, the rulings of which would ordinarily be expected to be binding (but see further below). That would mean that, where the panel finds that a party has breached the LPF commitments, that party would be required to take measures to comply with the ruling. On the other hand, where the panel finds against the complainant party, the latter would be obliged to cease any unilateral remedial measures it might have taken. At the same time, the other party could be permitted to take appropriate and time-limited remedial measures itself to address any harmful effects already suffered as a result of the complainant party's unilateral interim measures.

Although it would render the system more complex, consideration could also be given to the possibility of the arbitration panel rulings being advisory rather than binding, in cases where the panel finds in favour of the complainant party. Under this scenario, the party which is found to have breached LPF commitments would have the *option* of complying with the arbitration panel's ruling, and the remedial measures which it proposes. If the ruling is complied with, the interim remedial measures that the complainant party might have taken should cease. However, if the party which is found to have breached the LPF commitments chooses to disregard the panel's advisory ruling, the other party can continue to apply the same or other appropriate countervailing measures to address the continuing harmful effects of that breach.

On the basis of this approach, the regulatory autonomy of the parties would not be affected as they would have the option of disregarding the panel's ruling in these circumstances, and accept the consequences that this would have on access to the other party's market as a result of the imposition of countervailing measures. At the same time, the ability of the other party to put in place countervailing measures should provide sufficient incentives for both parties to maintain their

commitments in this regard.

It would be for the party applying the countervailing measures to decide, perhaps within certain predefined parameters that the parties could agree, what these might entail. For example, these might not be restricted to imposing (or raising) tariffs on specific goods but could also involve restricting the other party's access to its market, or aspects of its market, in some other respect. Under this scenario, the other party could then have the right to trigger the dispute resolution mechanism, involving initially Joint Committee consultations, over the appropriateness of the countervailing measures, with an arbitration panel being set up to consider the matter where the Joint Committee fails to resolve the dispute. The panel's ruling on the appropriateness of the countervailing measures should be binding. In this regard, consideration should also be given to the question of whether the application of countervailing measures should be stayed or not be put into effect until the conclusion of the dispute resolution process.

The question of harmful effects and other relevant considerations

Equally crucial in this context, would be the question of how to establish that a new measure or policy change by one side, constitutes a breach of the commitment to maintain common high standards, in that it is harmful to open and fair competition. For example, it would seem reasonable that this should involve not only consideration of the harmful effects on competition that have already accumulated but also the harmful effects that are likely to accrue if the measure or policy in question were to remain in place.

Ultimately, the question of how to demonstrate the presence of harmful effects should be determined primarily by reference to economic rather than legal considerations. In this regard, given that the UK would no longer be part of the Single Market, demonstrating distortions of competition, or the threat of such distortions, could merit a higher evidential threshold than the question of whether a measure distorts or threatens to distort competition within the Single Market under EU law.

Similarly, EU Court of Justice rulings should not be relevant in the context of a dispute resolution system which would not be concerned with the interpretation of EU law but with the *effects* of a particular policy on open and fair competition between two parties in the context of a free trade agreement. This would be distinctly different from a situation where both sides to the agreement formed part of the Single Market or aspects of it.

Separately, careful consideration should also be given to the question of whether, from a legal perspective, harmful effects should be deemed to have been established when the economic analysis demonstrates an *appreciable* effect on competition between the parties, with concomitant consideration of what that might mean.

It would, of course, be for the party asserting that the other has breached the obligation to maintain common high standards in a way which is harmful to competition, to provide relevant evidence to that effect, both within the context of Joint Committee consultations and, if necessary, submissions to the arbitration panel.

Finally, the two sides would need to agree on how to deal with circumstances where one side amends its existing rules so as to adopt a stricter approach in relation to a particular policy area which is subject to LPF commitments. It would be important to establish whether this should automatically trigger an obligation on the other to adopt measures of an equivalent effect (but with the option of not doing so subject to countervailing remedial measures by the other) or whether the LPF system

should be based solely on an agreement for non-regression as regards certain rules and standards that apply at the end of the transition period.

A matter of importance

It should be obvious from the above brief outline that devising a system which respects the regulatory autonomy of each side, whilst also ensuring access to each other's market on terms which provide for open and fair competition, would be complex and might necessitate the consideration of novel approaches. Ultimately, the wider benefits that would ensue for both parties from trade and co-operation within the context of a comprehensive free trade agreement, justify the further careful consideration of possible ways to bridge the gap between them, not least on the crucial issue of LPF commitments.

[1] *Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom*, 17 October 2019.

[2] Ibid., at para 77.

[3] Ibid. Para 21 also provides that "…with a view to facilitating the movement of goods across borders, the Parties envisage comprehensive arrangements that will create a free trade area, combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition…"

[4] That is to say, access which goes beyond trading under WTO terms.

[5] The GPA is an agreement between certain WTO members, including the EU, the United States, Canada, Japan and South Korea. It seeks to achieve greater liberalisation and expansion of world trade by means of the creation of an "effective" multilateral framework for government procurement. This involves GPA parties opening up their public procurement markets, at least partly, to each other's suppliers and undertaking to ensure the conduct of transparent, impartial and fair public procurements.

[6] See in particular the Prime Minister's speech in Greenwich on 3 February, https://www.gov.uk/government/speeches/pm-speech-in-greenwich-3-february-2020.

[7] Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, 25 February 2020, para 97. https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf.

[8] Adding further to this ambiguity, the same paragraph also indicates that an agreement on LPF provisions should "rely" on "appropriate and relevant" EU and international standards, a reference which might suggest EU standards constituting more than a reference point in at least some areas. Whether this should be read as a specific reference to State aid or whether it is intended to relate to other policy areas also is currently unclear.

[9] Recent EU association agreements, incorporate requirements for the approximation of EU law. This essentially involves trading partners having to implement EU laws domestically in a number of policy areas and to keep such domestic legislation in line with EU legislation as this is amended over time. This might be seen as a policy which is specific to European countries aspiring to join the

EU. However, it could also be interpreted more widely as an EU policy which seeks to maintain, to the extent possible, regulatory alignment with neighbours with privileged access to its market.

[10] The Future Relationship with the EU: The UK's Approach to Negotiations, 27 February 2020, paras 65, 68, 76, 78 and 81. https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu.

[11] These provisions were drafted specifically in relation to State aid compliance by the UK and were actionable by the EU alone. However, they can be adapted accordingly for the purposes of compliance with LPF commitments in all agreed areas and made actionable by both sides.

[12] The Withdrawal Agreement of 17 October 2019 incorporates provisions (Articles 164 – 166) for a Joint Committee with responsibility for the implementation and application of that Agreement. The same or a parallel Joint Committee could be set up along similar lines for the purposes of the implementation and application of the LPF commitments or the trade agreement more generally.